

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

74-2580

United States Court of Appeals

For the Second Circuit

THEODORE GRIECO, JR.,
Plaintiff-Appellant,
against

MEMORIAL HOSPITAL OF GREENE COUNTY,
FRANCIS FUGARO,
Defendants-Appellees,
and

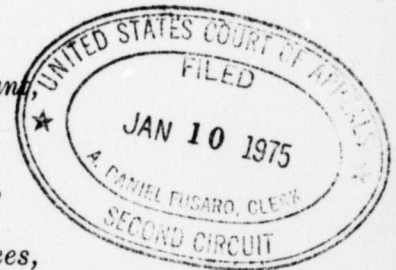
PAUL M. SNAPPER,
Defendant.

**On Appeal from the United States District Court
for the Southern District of New York**

APPENDIX

GAIR, GAIR & CONASON
Attorneys for Plaintiff-Appellant
84 William Street
New York, New York 10038
(212) 943-1090

MAYNARD, O'CONNOR & SMITH
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Barclay Heights, Route 9W
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P/S

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INDEX TO APPENDIX

	PAGE
Docket Entries-----	2a
Summons-----	4a
Complaint-----	5a
Notice of Motion (Hospital)-----	11a
Moving Affidavit (Clark)-----	13a
First Opposing Affidavit-----	17a
Exhibit - Certif. of Incorporation-----	25a
Exhibit - Certif. of Existence-----	31a
Notice of Motion (Fugaro)-----	34a
Moving Affidavit (Fugaro)-----	36a
Exhibit - Laws of 1931-----	42a
Exhibit - Act No. 2 of the year 1931-----	43a
Exhibit - Agreement and Resolution-----	45a
Exhibit - Monahan Decision-----	54a
Further Moving Affidavit-----	56a
Second Opposing Affidavit-----	61a
Third Opposing Affidavit-----	73a
Exhibit - Pope Decision-----	78a
Exhibit - Sec. of State Form-----	82a
Additional Moving Affidavit-----	83a
Memorandum Opinion-----	86a
Judgment-----	91a
Notice of Appeal-----	92a

1a.

UNITED STATES COURT OF APPEALS
For the Second Circuit

THEODORE GRIECO, JR.,

Plaintiff-Appellant

-against-

MEMORIAL HOSPITAL OF GREENE COUNTY,
FRANCIS FUGARO,

Defendants-Appellees

-and-

PAUL M. SNAPPER,

Defendant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DOCKET ENTRIES

<u>DATE</u>	<u>PROCEEDINGS</u>
<u>1974</u>	
Aug. 1	Filed complaint and issued summons
Aug. 26	Filed Defts (Memorial Hospital) affidavit & notice of motion to dismiss complaint against it ret. 9-3-74.
Aug. 30	Filed stip. & order that the motion of Deft. Memorial Hospital of Greene County, to dismiss the complaint is adjourned to 9/20/74, Pollack, J.
Sep. 19	Filed Deft. Francis Fugaro's affidavit and notice of motion re: order dismissing the complaint, against said Deft. ret: 10/1/74.
Sep. 19	Filed Deft. Francis Fugaro's memo. of law in support of motion to dismiss.
Sep. 25	Filed summons and ent. marshal's ret. served on: (1) Memorial Hospital of Greene County by Mr. Smith 8/8/74; (2) Francis Fugaro by same 8/28/74; (3) Paul M. Snapper by same 9/17/74
Oct. 1	Filed further affidavit in opposition to motion of Deft. Memorial Hospital of Greene County, by Herman Schmertz.
Oct. 1	Filed affidavit of Herman Schmertz in opposition to motion of Deft. Fugaro, to dismiss.
Oct. 7	Filed answer of Deft. Paul M. Snapper to the complaint.
Oct. 23	Filed supplemental affidavit on behalf of Plff. in opposition to the motions of Defts. Memorial Hospital of Greene County and Francis Fugaro.
Nov. 4	Filed answering affidavit of Defts. Hospital and Fugaro.
Nov. 4	Filed Plff's memo. of law in opposition to motion.

3a.

Docket Entries

<u>Date</u>	<u>Proceedings</u>
Nov. 4	Filed affidavit of Raymond Clard in reply to the opposing affidavit of Herman Schmertz and in support of the motions of Hospital and Fugaro for dismissal.
Nov. 4	Filed affidavit of Herman Schmertz in opposition to the relief sought by Deft. Hospital.
Nov. 4	Filed memo endorsed on motion dated 8/26/74. Accordingly, the complaint herein is dismissed as against the Memorial Hospital of Greene County and Francis Fugaro, with costs. The court finds that there is no just reason for delay and judgment in their favor may be entered forthwith. FRCP 54(b). Pollack, J.
Nov. 13	Filed Judgment ordered that Defts. Memorial Hospital of Greene County and Francis Fugaro, have judgment against the Plff. Theodore Grieco, Jr. dismissing the complaint as to them only, with costs to be taxed. Pollack, J, approved. Judgment entered Clerk.
Nov. 27	Filed Plff's notice of appeal to the USCA from judgment entered on 11-13-74. Mailed copy to Maynard O'Connor & Smith.
Nov. 27	Filed Plff's undertaking for costs on appeal, in the sum of \$250. by the U.S. Fidelity and Guaranty Co.

4a.

SUMMONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

To the above named Defendants:

You are hereby summoned and required to serve
upon Gair, Gair & Conason, Esqs. plaintiff's attorneys
whose address is

84 William Street
New York, New York 10038

an answer to the complaint which is herewith served upon
you, within 20 days after service of this summons upon
you, exclusive of the day of service. If you fail to do
so, judgment by default will be taken against you for
the relief demanded in the complaint.

s/ Raymond F. Burghardt
Clerk of Court.

s/ S. Harbison
Deputy Clerk.

Date: August 1, 1974

Note.-This summons is issued pursuant to Rule 4 of the
Federal Rules of Civil Procedure.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Plaintiff Demands
Trial by Jury.

Plaintiff, complaining of the defendants, by Gair, Gair & Conason, his attorneys, respectfully shows to this Court and alleges as follows :

FIRST : Plaintiff is a citizen of the State of New Jersey, the corporate defendant is incorporated under the laws of the State of New York and has its principal place of business in the State of New York, and the two individual defendants are citizens of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

SECOND : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Memorial Hospital of Greene County, was and still is a domestic corporation duly organized and existing under and by virtue of the Laws of the State of New York and was chartered under the Laws of the State of New York as a hospital corporation.

THIRD : Upon information and belief, that at all the times hereinafter mentioned, the defendant,

6a.

Complaint

Memorial Hospital of Greene County, owned a hospital located at 159 Jefferson Heights, Catskill, New York 12414.

FOURTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Memorial Hospital of Greene County, managed, operated, maintained, controlled, and conducted a hospital located at 159 Jefferson Heights, Catskill, New York 12414.

FIFTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Francis Fugaro, was a physician and surgeon duly licensed to practice medicine and surgery in the State of New York.

SIXTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Francis Fugaro, specialized in the field of urology.

SEVENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Francis Fugaro, was associated with the defendant hospital.

EIGHTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Francis Fugaro, was on the staff of the defendant hospital.

Complaint

NINTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Francis Fugaro, was acting as an agent of the defendant hospital.

TENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Francis Fugaro, was an employee of the defendant hospital.

ELEVENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Francis Fugaro, was acting within the course and scope of his employment with the defendant hospital.

TWELFTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Paul M. Snapper, was a physician and surgeon duly licensed to practice medicine and surgery in the State of New York.

THIRTEENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Paul M. Snapper, specialized in the field of urology.

FOURTEENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Paul M. Snapper, was associated with the defendant hospital.

8a.

Complaint

FIFTEENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Paul M. Snapper, was on the staff of the defendant hospital.

SIXTEENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Paul M. Snapper, was acting as an agent of the defendant hospital.

SEVENTEENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Paul M. Snapper, was an employee of the defendant hospital.

EIGHTEENTH : Upon information and belief, that at all the times hereinafter mentioned, the defendant, Paul M. Snapper, was acting within the course and scope of his employment with the defendant hospital.

NINETEENTH : That on January 13, 1974, the plaintiff received certain medical care and treatment at the defendant hospital.

TWENTIETH : That on January 13, 1974, the defendant, Francis Fugaro, rendered certain medical care and treatment to the plaintiff.

TWENTY-FIRST : That on January 13, 1974, the

Complaint

defendant, Paul M. Snapper, rendered certain medical care and treatment to plaintiff.

TWENTY-SECOND : That the defendants, their agents, servants and employees were negligent and careless in the medical care and treatment of the plaintiff.

TWENTY-THIRD : That by reason of the foregoing, the plaintiff, Theodore Grieco, Jr., sustained injuries to his limbs and body, including loss of a testicle, a severe shock to his nervous system and certain internal injuries, and has been caused to suffer severe physical pain and mental anguish as a result thereof and, upon information and belief, some of these injuries are of a permanent and lasting nature, that the plaintiff has been confined to bed and home as a result thereof and has been caused to abstain from the duties of his vocation, and has been caused to expend and become obligated to expend sums of money for medical attention and medicines, all to his damage in the sum of ONE MILLION and 00/100 (\$1,000,000.00) DOLLARS.

TWENTY-FOURTH : That the aforesaid occurrence and injuries sustained by the plaintiff, Theodore Grieco, Jr., were in no way caused or contributed to by any fault or lack of care on his part.

10a.

Complaint

WHEREFORE, the plaintiff, Theodore Grieco, Jr., demands judgment against the defendants in the sum of ONE MILLION and 00/100 (\$1,000,000.00) DOLLARS, together with the costs and disbursements of this action.

GAIR, GAIR & CONASON
Attorneys for Plaintiff

By: s/ ERNEST R. STEIGMAN
A Member of the Firm

Office & P.O. Address
84 William Street
New York, New York 10038

11a.

NOTICE OF MOTION (HOSPITAL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

PLEASE TAKE NOTICE that upon the affidavit of RAYMOND CLARK, sworn to on the 20th day of August, 1974, and designated "Exhibit A", and upon the Complaint and all of the prior pleadings and proceedings held herein, the undersigned will move this Court at a Motion Term thereof, to be held at the United States District Court for the Southern District of New York, at Court Room 506 of the United States Court House, Foley Square, Manhattan, New York 10007, on the morning of September 3, 1974 at 10:30 A.M., or as soon thereafter as counsel can be heard, for an Order dismissing the Complaint against the defendant, MEMORIAL HOSPITAL OF GREENE COUNTY, on the following grounds:

1st. That defendant, Memorial Hospital of Greene County is a Department of the County of Greene, State of New York, against which actions must be brought in the County of Greene as provided by Section 52 of the County Law of the State of New York. Or, in the alternative

2nd. Said defendant moves the Court to dismiss the action because the Complaint fails to state

12a.

Notice of Motion (Hospital)

a claim against said defendant upon which relief can be granted in that no notice of claim was ever served on said defendant as required by Section 50-e of the General Municipal Law of the State of New York, and thereby any action against the County of Greene is barred by the Statute of Limitations set forth in Section 50-i of the General Municipal Law of the State of New York, as more particularly appears from the affidavit of Raymond Clark attached hereto, and for such other and further relief as to the Court may seem just and proper.

DATED: August 22, 1974.

MAYNARD, O'CONNOR AND SMITH
By: s/Michael E. Catalinotto
Of Counsel
Office & P.C. Address
Barclay Heights, Route 9W
Saugerties, New York 12477
Attorneys for Defendant
Memorial Hospital of Greene County

TO: GAIR, GAIR & CONASON, ESQS.
Attorneys for Plaintiff
84 William Street
New York, New York, 10038

MOVING AFFIDAVIT (CLARK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK
COUNTY OF GREENE SS:
VILLAGE OF CATSKILL

RAYMOND CLARK, being duly sworn, deposes and
says:

1st. That he is the Administrator of the
Memorial Hospital of Greene County, a hospital which is
a Department of the County of Greene, State of New York.

2nd. That the above entitled action is an
action in negligence or malpractice brought in behalf of
the plaintiff arising out of his care and treatment on
January 13, 1974, as more fully set forth in his Com-
plaint, a copy of which is attached hereto and marked
"Exhibit B".

3rd. A copy of the Summons and Complaint
was served upon your deponent on August 8, 1974.

4th. Your deponent submits that Section 52,
subdivision 1 of the County Law of the State of New York
requires in part that "the place of trial shall be in
the county against which the action is brought". It is
respectfully submitted that this Court has no juris-
diction of the subject matter or of the person of the

14a.

Moving Affidavit (Clark)

defendant County and that any action against the defendant County must be brought in the Supreme Court of the State of New York, held in and for the County of Greene.

5th. In the alternative, your deponent submits that the Complaint should be dismissed for failure to state a cause of action against the Memorial Hospital of Greene County on the ground that the plaintiff has not filed the notice of claim required by Section 50-e of the General Municipal Law of the State of New York; on the ground that the Complaint fails to allege compliance with the requirement set forth in said Section 50-e; and on the further ground that any action against the Memorial Hospital of Greene County is barred by the Statute of Limitations set forth in 50-i of the General Municipal Law of the State of New York.

6th. Section 52 of the County Law of the State of New York requires that any claim or notice of claim for damage, injury or death, must be made and served in compliance with Section 50-e of the General Municipal Law and that every action upon such claim shall be commenced pursuant to the provisions of Section 50-i of the General Municipal Law. Section 50-e re-

15a.

Moving Affidavit (Clark)

quires that the notice of claim be served "* * * within 90 days after the claim arises". In the case at bar the claim arose not later than January 13, 1974, and the statute required that a notice of claim be served not later than ninety (90) days thereafter. To date, no notice of claim has been served on the defendant, MEMORIAL HOSPITAL OF GREENE COUNTY, or the County of Greene.

7th. Section 50-i of the General Municipal Law of the State of New York requires that a notice of claim must be served as required by Section 50-e. Here the Complaint indicates that the date upon which the claim is based is January 13, 1974. Thus, the statute required that a notice of claim be served not later than April 13, 1974. However, no notice of claim has ever been filed. Accordingly, the Statute of Limitations set forth in Section 50-i of the General Municipal Law of the State of New York requires that the Complaint in this action be dismissed for failure to state a cause of action.

WHEREFORE, your deponent prays for an Order dismissing the Complaint of the plaintiff herein, and for such other and further relief as to the Court may

16a.

Moving Affidavit (Clark)

seem just and proper.

S/ Raymond Clark

Sworn to before me this

20th day of August, 1974.

S/Michael E. Catalinotto
Notary Public, State of New York

17a.

FIRST OPPOSING AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

HERMAN SCHMERTZ, being duly sworn, deposes
and says:

He is an attorney at law, a member of the
firm of Gair, Gair & Conason, who are attorneys for
plaintiff herein and is duly admitted to practice in all
the Courts of this State as well as this Southern Dis-
trict.

Deponent has read the notice of motion and
supporting affidavit of Raymond Clark which have been
filed herein in support of the motion of defendant,
Memorial Hospital of Greene County, to dismiss the com-
plaint on the alternative grounds itemized in the said
notice of motion dated August 22, 1974; he makes the
instant affidavit and submits the accompanying Memoran-
dum of Law in opposition to the relief sought by the
said defendant.

This is an action to recover damages sus-
tained by reason of the malpractice, negligence and

First Opposing Affidavit

carelessness of defendant Memorial Hospital in the care and treatment of plaintiff on or about January 13, 1974. The crux of the charges against the said defendant relate to its culpable failure and omission to properly diagnose and treat a malady or disorder in one of plaintiff's testicles, with the result that he was thereafter caused to suffer its loss. Incidentally, the other named defendants are alleged to be physicians either on the staff of, associated with, or agents and servants of the said defendant, Memorial Hospital. At the time of the service of the notice of motion herein on deponent's firm, neither of these two individual defendant doctors had been served. Subsequent to that date, to wit, August 28, 1974, named defendant, Dr. Francis Fugaro, was served. The remaining defendant has not as yet been made a party.

Moving defendant, Memorial Hospital, urges as a first stated ground of its motion for dismissal, that this Court lacks jurisdiction either of the subject matter or person, per force of the provision in Section 52 of the County Law that "[T]he place of trial shall be in the county against which the action is brought." On this score, deponent states prelimin-

19a.

First Opposing Affidavit

arily that for reasons to be outlined below, this action is by no means subject to the County Law at all. Deponent will seek to demonstrate that this action involves a claim against a membership corporation which is not entitled to any of the alleged benefits and privileges contained in Article 2 of the State County Law. Passing that for this moment, even assuming arguendo that there was a semblance of merit to movant's contention that plaintiff is bound by the just-quoted sentence of the County Law, the law is extremely clear - as shown in deponent's accompanying Memorandum of Law - that the provision as to place of trial in Section 52 has absolutely no relationship whatever to jurisdiction. To the contrary, it is nothing more than a venue provision at best. It should be noted, incidentally in this context, that this action has in fact been commenced in the Southern District of New York, which is the very District which includes Greene County. As further elaborated in deponent's accompanying Memorandum, plaintiff has therefore fully complied with the mandate of Section 52 in terms of venue. In short, this ground of the motion for dismissal is patently out of order.

First Opposing Affidavit

Defendant in a single phrase by affiant Clark, next claims that the Hospital is "a Department of the County of Greene * * *."

It is undeniable fact as investigation revealed, that at the time plaintiff came under the defendant's care and treatment in January, 1974 as well as for the past 49 years, to and through the instant date, defendant Memorial Hospital was and still is filed with the Secretary of State as a corporate entity, organized under the Membership Corporation Law.

Moreover, subsequent to receipt of defendant's motion papers, and for use in confirming defendant's corporate status, this office obtained certified copies of two documents which, on August 28, 1974, were certified by the Secretary of State as true copies of documents presently on file. Copies of these documents and certifications thereof are annexed to this affidavit and made a part hereof. They show, in crucial substance, that on May 18, 1926 Memorial Hospital of Greene County, Inc., was granted status as a membership corporation of the State of New York, incorporated for the purpose of "maintaining a hospital or hospitals in the Village of Catskill, Greene County, New York, for the care and

21a.

First Opposing Affidavit

treatment of sick and injured persons * * *." On or about March 6, 1951, this corporation executed and filed with the Secretary of State a "Certificate of Report of Existence of Memorial Hospital of Greene County, Inc." This Certificate reveals that the existence of the said corporation which was formed 25 years before, is thereby continued. This document states on its face that it was filed pursuant to Section 57 of the Membership Corporation Law, which required such renewal papers to be filed by all membership corporations at peril of dissolution.

Thus, in view of the fact that defendant, Memorial Hospital of Greene County, was formed, organized and renewed as a separate corporate entity, pursuant to the Membership Corporation Law, the averment by moving affiant Clark that Memorial Hospital is a Department of the County - without elaboration or documentation - does little to blunt the recorded contrary facts annexed to deponent's opposing papers. On this score, the Membership Corporation Law as well as its successor Act (Not-For-Profit-Corporation Law) may be searched in vain for any provision which demands any such thing as the service of a notice of claim as pro-

First Opposing Affidavit

vided in Section 52 of the County Law or General Municipal Law. As will be shown in the accompanying Memorandum, Membership Corporations have always been subject to suit in the same manner as any other private individual.

Deponent's firm has no knowledge of the existence of any records which might have caused affiant Clark to state that Memorial Hospital is a County department. For all that is known or appears, it is conceivable that there may be in existence some funding or cooperative arrangement by which the Memorial Hospital may be the recipient of County assistance in some form. Deponent can only conjecture as to whether and to what extent affiant Clark may be referring to some such existing arrangement. But that, it is submitted, would not serve to alter or affect the hospital's separate corporate status.

A crux of the matter too is that as of now, by virtue of defendant's incomplete papers, we are at a loss to fully know what further facts defendant might seek to interpose either in reply hereto or later on in this litigation. We assume it cannot counter the force of the documents on public file. Should it seek to do

First Opposing Affidavit

so, however, the very best which might ever be said for movant's position is that it be permitted to raise by affirmative defense the allegation of County status - that is, assuming that in reply on this motion, defendant for the first time reveals some substantial documentation for its presently unsupported allegation. In this way, full pretrial depositions and discovery might be conducted to equate both sides to the full substance of defendant's contentions as to status. As of the present, defendant's exclusivity of knowledge and access to material must prevent summary disposition in its favor of its dilatory plea by way of complete defense.

Of course, as aforesaid, under the present state of the record, the motion should summarily be denied. Deponent advances the above paragraph only in the event defendant - in reply hereto - should see fit to make a detailed exposition of facts contained in some private papers, which we would be powerless to refute at this time.

By the same token, depending upon the nature of any allegations as to the hospital's status to be conceivably advanced by defendant, plaintiff asserts

24a.

First Opposing Affidavit

waiver and/or estoppel against the demand for a 90 day notice of claim. This, of course, is predicated upon defendant's unfair tactics in causing, permitting, suffering and/or allowing existing records to reveal false facts as to the nature of the hospital's entity. Defendant cannot on the other hand claim the protection of County Law, yet at the same time, conceal the nature of the entity which owns, operates and/or maintains the hospital at which plaintiff was given professionally improper treatment.

In light of the foregoing, deponent strenuously contests and opposes the summary relief presently sought by defendant.

WHEREFORE, deponent respectfully requests that the motion be denied.

s/ Herman Schmertz

Sworn to before me this
13th day of September 1974.

s/ ANNE T. ZITO (HOPP)

NOTARY PUBLIC

25a.

EXHIBIT - CERTIF. OF INCORPORATION

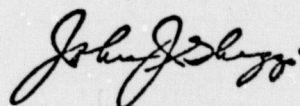
State of New York }
Department of State } ss.:

24544

I hereby certify that I have compared the annexed copy with the original document filed by the Department of State and that the same is a correct transcript of said original.

Witness my hand and seal of the Department of State on

AUG 28 1974



Acting Secretary of State

662-504

Exhibit - Cert. of Incorporation

State of New York
State Board of Charities
 The Capitol at Albany

In the Matter of the Incorporation
 of

Memorial Hospital of Greene County, Inc.

Whereas, Application has been made to the State Board of Charities for its approval of the incorporation of

Memorial Hospital of Greene County, Inc. and

Whereas, On due inquiry and investigation it appears to said Board desirable and proper that such association shall be so incorporated.

Now, Therefore, In pursuance of and in conformity with the provisions of the Laws of the State of New York, the said State Board of Charities hereby certifies that it approves of the incorporation of said Memorial Hospital of Greene County, Inc.

the certificate of incorporation of which is herewith annexed.

In Witness Whereof, the said Board has this 18th day of May, 1926, caused these presents to be subscribed by its President and attested by its Secretary and its official seal to be herewith affixed.

R. H. Brammick
 PRESIDENT

ATTEST

Charles H. Brown

SECRETARY

2524-93-1

Exhibit - Cert. Of Incorporation

**CERTIFICATE OF INCORPORATION OF
MEMORIAL HOSPITAL OF GREENE COUNTY, INC.,
PURSUANT TO ARTICLE III OF THE
MEMBERSHIP CORPORATIONS LAW.**

We, the undersigned, all being persons of full age, citizens of the United States and residents of the State of New York, desiring to form a corporation under Article III of the Membership Corporations Law of the State of New York, for the purpose of erecting, establishing and maintaining a hospital or hospitals in the Village of Catskill, Greene County, New York, for the care and treatment of sick and injured persons, do hereby make, subscribe and acknowledge this certificate as follows:

1. The name of the proposed corporation is Memorial Hospital of Greene County, Inc.

2. The particular object for which said corporation is to be formed is the erection, establishing and maintaining of a hospital or hospitals in the Village of Catskill, Greene County, New York, for the care and treatment of sick and injured persons.

3. The operations of said corporation are to be principally conducted in the county of Greene, New York, and its principal office is to be located in the Village of Catskill, in said county.

4. The number of its directors shall be five.

5. The names and places of residence of the persons to be its directors until its first annual meeting are as follows:

<u>NAMES</u>	<u>RESIDENCE</u>
Howard C. Smith	Catskill, New York.
Addison P. Jones	Catskill, New York.
George W. Irwin	Catskill, New York.
Richard A. Austin	Cairo, New York.
J. Frank Lackey	Tannersville, New York.

2529-93-7

Exhibit - Cert. Of Incorporation

6. The annual meeting of said corporation shall be held on the second Monday of January of each year.

IN WITNESS WHEREOF, we have made, subscribed and
acknowledged this certificate, in duplicate, this 9th day of
April, 1926.

~~John H. Fair~~
Miss C. Davis
Gardner - Coffin
George B. Clifton
Champlin Clarke
Richard Allen
Norman Brown
Richard ...
Addison ...
Philip ...
J. Edgar Johnston
Harvey J. Scott
Lewis B. Secker
Frank E. Sicker
George W. ...
...
Goodman
Howard & Muller
Wendell ...
Levi R. Page
Howard & Smith

29a.

Exhibit - Cert. Of Incorporation

STATE OF NEW YORK,)
COUNTY OF GREENE,) SS:

On this 9th day of April, 1926, before me, the subscriber, personally came J. Frank Lackey, Willis P. Goldin, P. Gardner Coffin, George E. Austin, Champlin Clarke, Louis A. Miller, Herman C. Cowen, Richard A. Austin, Addison P. Jones, Philip L. Walsh, M. Edw. Silberstein, Harvey S. Scutt, Louis B. Decker, Frank S. Decker, George W. Irwin, J. Henry Deane, Geo. A. Deane, Howard E. Muller, Wendell S. Sherman, Lewis M. Magee, and Howard C. Smith, to me known and known to me to be the persons described in and who executed the foregoing instrument and they severally acknowledged that they executed the same.

Earl R. Simmons

Notary Public.

I, *James H. Russell* a Justice of the Supreme Court of the Third Judicial District of the State of New York, do hereby approve the foregoing certificate of incorporation.

Dated at Albany, N. Y., *May 20*, 1926.

James H. Russell
Justice Supreme Court.

4
2529-83-4

30a.

Exhibit - Cert. Of Incorporation

2528
83
CERTIFICATE OF INCORPORATION

OF

MEMORIAL HOSPITAL OF GREEN
COUNTY, INC.

PURSUANT TO ARTICLE III OF
THE MEMBERSHIP CORPORATIONS
LAW.

6/1

STATE OF NEW YORK
OFFICE OF THE
SECRETARY OF STATE

FILED MAY 20 1926

TAX

PHILIP C. STE

None
20
Thomas J. Stupp

SECRETARY OF STATE

BY _____
CAREER

John W. Wadsworth, Esq.
ATTORNEY AT LAW
CATTARAUGUS, N. Y.

2528-83-5

31a.

EXHIBIT - CERTIF. OF EXISTENCE

State of New York }
Department of State } ss.:

24545

*I hereby certify that I have compared the annexed copy with the original document filed by the Department of State
and that the same is a correct transcript of said original.*

Witness my hand and seal of the Department of State on

AUG 28 1974

John J. Blum

Acting Secretary of State

32a.

Exhibit - Cert. Of Existence

Certificate of Report of Existence
of
Memorial Hospital of Queens County, Inc.
Exact Name of Corporation

- Pursuant to Section 57 of the Membership Corporations Law
1. The name of the corporation is Memorial Hospital of Queens County, Inc. The
Name of Corporation
- original name was St. George's
If name has been changed, insert original name.

2. The certificate of incorporation was filed in the Department
of State on May 22, 1953
Date of Incorporation

3. The corporation was formed pursuant to Article 11 of the Membership
Corporations Law, Chapter 11, Laws of 1952, No. 11
Cite Incorporation Statute

4. The existence of the foregoing corporation is hereby continued.

To be signed by an officer,
trustee, director or five
members in good standing.

State of New York)
County of Queens) SS.:

On this 13th day of March, 1957, before me
personally appeared John J. Fray to me personally known
and known to me to be the person(s) described in and who executed
the foregoing certificate, and (he) (they) thereupon acknowledged
to me that (he) (they) executed the same for the uses and purposes
therein mentioned.

John J. Fray
Notary Public
My Commission expires March 30, 1959
County of Queens

NOTE: If the foregoing acknowledgment is taken without the State of
New York, the signature of the notary public should be
authenticated by a certificate of the clerk of the county in
which such notary has power to act, or other proper officer.

33a.

Exhibit - Cert. Of Existence

1561-238

Certificate of Report of
Existence of

Memorial Telephone Co. of N.Y.
Exact Name of Corporation

Pursuant to Section 57
of the
Membership Corporations
Law

Osborn, Bloodgood, Wilbur
Catekill, N.Y.

STATE OF NEW YORK
DEPARTMENT OF STATE
FILE NO. 1561

FILING FEE \$100

Thomas J. Glavin
Notary Public
N.Y.C. & Co.

NOTICE OF MOTION (FUGARO)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

PLEASE TAKE NOTICE that upon the affidavit of FRANCIS FUGARO, M.D., sworn to the 16th day of September, 1974, and designated "Exhibit A", and upon the Complaint and all of the prior pleadings and proceedings held herein, the undersigned will move this Court at a Motion Term thereof, to be held at the United States District Court for the Southern District of New York, at Court Room 506 of the United States Court House, Foley Square, Manhattan, New York 10007, on the morning of October 1, 1974, at 10:30 A.M., or as soon thereafter as counsel can be heard, for an Order dismissing the Complaint against the defendant, FRANCIS FUGARO, on the following grounds:

Said defendant moves the Court to dismiss the action because the Complaint fails to state a claim against said defendant upon which relief can be granted in that no notice of claim was ever served on said defendant as required by Section 52 of the County Law of the State of New York, and Section 50-e of the General Municipal Law, as more particularly appears from the affidavit of FRANCIS FUGARO, M.D., attached hereto, and

35a.

Notice Of Motion (Fugaro)

for such other and further relief as to the Court may
seem just and proper.

DATED: September 17, 1974.

MAYNARD, O'CONNOR AND SMITH

By: s/ Michael E. Catalinotto
Michael E. Catalinotto, Of Counsel
Office & P.O. Address
Barclay Heights, Route 9W
Saugerties, New York 12477
Attorneys for Defendant,
FRANCIS FUGARO

TO: GAIR, GAIR & CONASON, ESQS.,
Attorneys for Plaintiff
Office & P.O. Address
84 William Street
New York, New York 10038

MOVING AFFIDAVIT (FUGARO)

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK
SS:
COUNTY OF GREENE

FRANCIS FUGARO, M.D., being duly sworn, deposes and says:

1st. That he is a resident physician and that he is employed in his capacity as a resident physician by the Memorial Hospital of Greene County, a Department of the County of Greene, State of New York.

2nd. That the above entitled action is an action in negligence or malpractice brought in behalf of the plaintiff arising out of his care and treatment on January 13, 1974, as more fully set forth in his Complaint, a copy of which attached hereto and marked "Exhibit B".

3rd. A copy of the summons and complaint was served upon your deponent on August 28, 1974.

4th. Your deponent submits that the Complaint should be dismissed for failure to state a cause of action against him on the ground that he is an employee of the Memorial Hospital of Greene County, a Department

Moving Affidavit (Fugaro)

of the County of Greene, inasmuch as the plaintiff has not filed the notice of claim required by Section 52 of the County Law of the State of New York, and Section 50-e of the General Municipal Law of the State of New York; and on the further ground that the Complaint fails to allege compliance with the requirements set forth in Section 50-e of the General Municipal Law of the State of New York.

5th. Section 52 of the County Law of the State of New York requires that any claim or notice of claim for damage, injury or death, must be made and served in compliance with Section 50-e of the General Municipal Law and that every action upon such claim shall be commenced pursuant to the provisions of Section 50-i of the General Municipal Law. Section 50-e requires that the notice of claim be served "* * * within 90 days after the claim arises". In the case at bar the claim arose not later than January 13, 1974, and the statute required that a notice of claim be served not later than ninety (90) days thereafter. To date, no notice of claim has been served on the defendant, FRANCIS FUGARO.

6th. Section 52 of the County Law of the State of New York further provides that:

38a.

Moving Affidavit (Fugaro)

"No action shall be maintained against an officer, agent, servant or employee of a county unless the notice of claim for damages was filed in the manner and within the time prescribed in subdivision one and also served personally or by registered mail upon such officer, agent, servant or employee within the same period of time."

7th. That pursuant to Chapter 132 of the Laws of New York for 1931, the Legislature of the State of New York authorized and empowered the Board of Supervisors of Greene County to establish in such county a public general hospital. A copy of Chapter 132 of the Law of New York, 1931, is attached hereto, marked "Exhibit C" and made a part hereof.

8th. That by resolution of the Board of Supervisors of Greene County, dated February 16, 1931, the defendant hospital was duly created pursuant to Section 45 and 49 of the County Law and Section 126 of the General Municipal Law of the State of New York. That annexed hereto, marked "Exhibit D" and made a part of this affidavit is a certified copy of said resolution.

9th. That by virtue of said resolution the Memorial Hospital of Greene County was and still is an agency or department of the County of Greene and is entitled to all of the immunity and protection afforded

Moving Affidavit (Fugaro)

the County itself, and your deponent is likewise entitled to all of the immunity and protection afforded the County and the hospital inasmuch as your deponent is an employee of said hospital. Furthermore, it is alleged in paragraph "NINTH" of the Complaint that your deponent was an agent of the defendant hospital, and in paragraph "TENTH" that your deponent was an employee of the defendant hospital.

10th. That your deponent has been advised that the Board of Managers of the hospital is appointed by the Greene County Board of Supervisors and all hospital employees are subject to the New York State Civil Service Law and are paid by the Treasurer of Greene County.

11th. That your deponent has been advised that all operating income of the hospital is turned over to the Treasurer of Greene County who in turn pays all operating expenses.

12th. That no notice of claim by or on behalf of the plaintiff, THEODORE GRIECO, JR., has been served on your deponent as required by the County Law and the General Municipal Law of the State of New York and your deponent has been advised that no notice of

Moving Affidavit (Fugaro)

claim has ever been served on either the Memorial Hospital of Greene County or the County of Greene.

13th. That your deponent respectfully calls the attention of this Court to an unreported decision of the Supreme Court of the State of New York, held in and for the County of Clinton, entitled "DANIEL T. MONAHAN, JR., Plaintiff - against - HERBERT M. BERGAMINI, MARLON H. ATKINSON and MEMORIAL HOSPITAL OF GREENE COUNTY" (Justice Robert G. Main, now assigned to the Appellate Division, Third Judicial Department), which decision is dated July 19, 1962. A copy of Judge Main's decision in that case is marked "Exhibit E", attached hereto and made a part hereof. In that decision, Judge Main held that the hospital was entitled to summary judgment upon the ground that there has been no compliance with Section 52 of the County Law and Section 50-e of the General Municipal Law.

14th. That in support of this motion your deponent incorporates by reference the affidavit of RAYMOND CLARK, sworn to on August 20, 1974, together with the notice of motion dated August 22, 1974, served in behalf of Memorial Hospital of Greene County, the originals of which are already in the Court's file.

41a.

Moving Affidavit (Fugaro)

WHEREFORE, your deponent prays for an Order dismissing the Complaint of the plaintiff herein, and for such other and further relief as to the Court may seem just and proper.

s/ Francis Fugaro, M.D.
FRANCIS FUGARO, M.D.

Sworn to before me this
16th day of September, 1974.

s/ John A. Murray
John A. Murray
Notary Public, State of New York

EXHIBIT - LAWS OF 1931

CHAPTER 132

AN ACT authorizing and empowering the board of supervisors of Greene county to determine by resolution to establish in such county a public general hospital and dispensing with the approval of such resolution at a general county election

Became a law March 24, 1931, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The board of supervisors of Greene county are hereby authorized and empowered to determine by resolution, in accordance with section one hundred and twenty-six of the general municipal law, that there shall be in such county a public general hospital for the care and treatment of the sick and that suitable lands be acquired therefor and proper buildings erected or reconstructed thereon with money to be paid to such county from a trust fund now held for that purpose which was created by the consolidation of several trust bequests provided in wills of deceased persons and other gifts of money heretofore or hereafter added to such trust fund. All proceedings under such resolution shall be had and taken pursuant to the provisions of section one hundred and twenty-six of the general municipal law, except that, inasmuch as no appropriation for lands and buildings from funds of the county will be necessary, such resolution shall become effective without the approval of an appropriation for such purposes at a general county election by a majority of the voters qualified to vote and voting upon such proposition.

Establishment of hospital authorized.

§ 2. This act shall take effect immediately.

February 16, 1931.

An Act creating a Greene County Hospital, pursuant to Sections 45 and 49 of the County Law and Section 126 of the General Municipal Law, as amended.

On motion Mr. Travis.

WHEREAS, a committee of the Board of Supervisors of Greene County has heretofore been appointed to examine the question of the advisability of the establishment in and for Greene County, of a County Hospital, pursuant to Sections 45 and 49 of the County Law and Section 126 of the General Municipal Law, and report their findings in connection therewith, and

WHEREAS, such committee has duly submitted to this Board, its report thereon, which report was duly approved and ordered filed at the meeting of this Board on February 9, 1931, and

WHEREAS, at the time of approval and filing of said report additional time was requested for a further consideration of the report and its contents, and since the said meeting of this Board on February 9, 1931, your committee, accompanied by various members of the Board have discussed further the question of the establishment of said County Hospital with the New York State Department of Health, and

WHEREAS, it appears that the Greene County Memorial Hospital Committee is ready and willing to transfer to the County of Greene, the sum of \$ 35,000. for the erection and equipment of a Greene County Hospital, to be located in Catskill, New York, and the New York State Department of Health is ready and willing to appropriate and make available a like sum for the said purposes and

WHEREAS, it also appears that the cost of maintenance

Exhibit - Act #2 of the year 1931
and operation of a Greene County Hospital, over and above the usual income derived from the inmates and patients, would be met jointly by the Greene County Memorial Hospital Committee with income upon trust funds held by them for that purpose and by the State of New York from funds under the direction and supervision of the New York State Department of Health, so that Greene County would not be called upon to appropriate any funds either for the erection equipment and maintenance of said County Hospital.

Now, therefore, Be it resolved, that there be established in and for the County of Greene pursuant to Sections 45 and 49 of the County Law and 126 of the General Municipal Law, a County Hospital, said Hospital to be erected in the Village of Catskill, at a cost not to exceed \$ 70,000. including equipment, and to be operated with funds jointly from the State of New York, Department of Public Health, pursuant to said Sections 45 and 49 of the County Law and Section 126 of the Municipal Law, and funds jointly to be received from the Trustees of the Greene County Memorial Hospital Committee; Said trustees to provide the amount of \$ 35,000., for the erection and equipment of said Hospital, and also such amounts as may be necessary from the income of the trust funds in the hands of said Greene County Memorial Hospital Committee to meet any deficit which might occur in the maintenance and operation of said Hospital.

All members present, 13 voting aye, 1 absent - Van Houten.
Motion carried.

STATE OF NEW YORK, GREENE COUNTY } ss:
Office of Clerk of the County Legislature

Deputy

I, the undersigned, Clerk of the Greene County Legislature

Do Hereby Certify, that I have compared the annexed copy of Act No. 2
of the Year 1931 ***

with the original record in this office, and that the same is a correct transcript thereof and of the whole of said original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Greene County Legislature, this 9th day of September, 1974

John R. Clough
Deputy Clerk of the Greene County Legislature.

EXHIBIT - AGREEMENT AND RESOLUTION

December 29th, 1931

The Clerk read the following:

AGREEMENT, made this 15th day of December, 1931, between the Memorial Hospital of Greene County, Inc., a membership corporation organized under the laws of the State of New York, and having its principal office at Catskill, Greene County, New York, party of the first part, and the County of Greene, a municipal corporation of the State of New York, party of the second part:

WHEREAS, the party of the first part was organized under the Membership Corporation Law of the State of New York, May 20th, 1925, for the purpose of establishing and maintaining in the Village of Catskill, Greene County, New York, a public general hospital for the care and treatment of the sick, and has received and is entitled to receive certain gifts and bequests for that purpose under the wills of Alice Bonestel, Frances S. Mann and Margaret V. Austin, deceased; and

WHEREAS, the funds available to said party of the first part for that purpose have proven inadequate and insufficient to establish and maintain such a hospital, and a literal compliance with the terms of said wills is therefore impracticable and impossible; and

WHEREAS, there is in said County of Greene no public general hospital, and only a small Red Cross Center which is located at Tannersville, in said county, and there is constantly increasing need and demand for a public general hospital for the care of the sick in said county; and

WHEREAS, it has been proposed to the parties hereto by representatives of the New York State Department of Health that a county hospital be established in said county by the Board of Supervisors of said party of the second part, and such representatives have given the parties hereto assurance of State aid in the establishment and maintenance of such county hospital under Article 11-B of the Public Health Laws; and

WHEREAS, it has also been proposed that the funds which have been received or may be hereafter received under the above mentioned wills by the party of the first part for the establishment and maintenance of a public hospital in said county be devoted to the extent, in the manner and upon the conditions hereinafter stated, to the establishment and maintenance by the party of the second part of a county hospital in or near the Village of Catskill, aforesaid; and

WHEREAS, by special Act of the Legislature of this State (Chapter 132 - Laws of 1931), the Board of Supervisors of the party of the second part has been authorized and empowered to establish in said county a public general hospital, without the approval of such resolution at a general county election; and

WHEREAS, the establishment of such county hospital has been determined upon by the Board of Supervisors of the party of the second part, provided the party of the first part is authorized and directed by the Court to contribute from the funds held by it for hospital purposes to the extent, in the manner and subject to the conditions hereinafter stated;

Now, in consideration of One Dollar, and the mutual covenants and agreements herein contained, the parties hereto covenant and agree, subject to the approval of the Court, as follows:

(1). The Board of Supervisors of said party of the second part shall proceed to establish a County Hospital under Section 126 of the General Municipal Law, to be located in or near the Village of Catskill, in said county, as soon as practicable after the party of the first part shall be authorized by the court to contribute to the erection and maintenance of such hospital as hereinafter provided.

(2). The party of the first part will promptly apply to the Court for authority to so contribute to the erection and maintenance of such a County Hospital, and if authorized by the Court to do so will contribute one-half of the cost of procuring a suitable site in or near said Village of Catskill, and the

erection thereof and equipment of a public general hospital, such amount so to be contributed not to exceed \$50,000, and will also thereafter contribute from year to year, subject to the approval of the Court, to any deficit which may arise in the maintenance and operation of such hospital to the extent of one-half of such deficit, but not exceeding the income which may be received by said party of the first part on the remaining funds now held by it or to which it is entitled.

(3). The construction, maintenance and operation of such hospital shall in all respects meet the requirements of the New York State Department of Health so as to entitle the party of the second part to State aid under Article 11-B of the Public Health Law.

(4). As an express and continuing condition of such contribution by the party of the first part to the erection and maintenance of said hospital, a majority at least of the members of the Board of managers of said county hospital shall be selected, and their successors shall be appointed, by the Board of Supervisors of the party of the second part, from the members of the board of directors of the party of the first part, to the end that a majority at least of the Board of managers of said county hospital shall at all times be and consist of members of the board of directors of the party of the first part, and the party of the first part may withhold any contribution which may be authorized by the Court toward the erection or maintenance of said hospital in the event of the failure at any time to comply with such conditions.

(5). That the selection of a suitable site for such hospital in or near said Village of Catskill shall be made by the Board of Supervisors of the party of the second part, but the selection of such site shall be so made by said Board of Supervisors only after approval thereof by the board of managers of said hospital.

(6). This agreement is conditioned upon the approval by the Court of the proposed contribution by the party of the first part to the establishment and maintenance of such county hospital upon the terms and conditions herein stated, and shall become effective and binding upon the parties hereto immediately upon the entry

48a.

of an order of the Court authorizing and approving such use of the funds of the party of the first part.

In Witness Whereof, the party of the first part has caused these presents to be executed by its President, and its corporate seal to be hereunto affixed, and the said party of the second part has caused these presents to be executed by the Chairman of the Board of Supervisors, and the seal of said County of Greene to be hereunto affixed, the day and year first above written, in duplicate.

MEMORIAL HOSPITAL OF GREENE COUNTY, INC.

By George W. Irwin, President.

By WILLIAM S. BORTHWICK,

Chairman of the Board of Supervisors

State of New York, County of Greene, ss:

On this 15th day of December, 1931, before me personally came George W. Irwin, to me known, who being by me duly sworn did depose and say, that he resides in the Village of Catskill, Greene County, New York; that he is the President of Memorial Hospital of Greene County, Inc., one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Margaret Hoy, Notary Public.

State of New York, County of Greene, ss.:

On this 15th day of December, 1931, before me personally came William S. Borthwick, to me known, who being by me duly sworn did depose and say that he resides at Cornwallville in the town of Durham, Greene County, New York; that he is the Chairman of the Board of Supervisors of the County of Greene, New York, one of the corporations described in and which executed the foregoing instrument; that he knows the seal of said County; that the seal affixed to said instrument is such county seal; that it was so affixed by order of the board of Supervisors of said County, and that he signed his name thereto by like order.

James Lewis Malcolm, Notary Public.

On motion of Mr. Travis,

RESOLVED, that the Chairman of this Board appoint a Committee of three members of the Board, of which the Chairman shall be a member ex-officio, for the purpose of suggesting the names of members for the Board of Managers of the "Memorial Hospital of Greene County", and be it further

RESOLVED, that this Committee meet forthwith and report such names as they suggest for members of said Board of Managers.

Motion carried.

The Chairman appointed the following committee: Wm. S. Borthwick, ex-officio, Travis, Fromer, Van Houten.

On Motion of Mr. Travis,

RESOLUTION

WHEREAS, the Memorial Hospital of Greene County, Inc., was organized under the Membership Corporation Law of the State of New York, May 20th, 1926, for the purpose of establishing and maintaining in the Village of Catskill, Greene County, New York, a public general hospital for the care and treatment of the sick, without restriction as to race, color or religion, pursuant to the provisions of the last will and testament of Alice Bonestel, who died a resident of the town of Catskill, in said County, April 16, 1916; and

WHEREAS, said Memorial Hospital of Greene County, Inc., has now in its custody the sum of \$60,481.25, representing the money and property received for hospital purposes under the will of the said Alice Bonestel, with the accumulated income thereon, and is entitled to receive under the will of Frances S. Mann, deceased, approximately \$60,000.00, to be held and invested by it and the interest used for the purposes of such a hospital, and is also entitled to receive about \$10,000.00, for the purposes of such a hospital, under the will of Margaret V. Austin, deceased; and

WHEREAS, the funds so available to said Memorial Hospital of Greene County, Inc., have proven inadequate and insufficient to establish and maintain such a hospital, and a literal compliance with the terms of said wills is impracticable and impossible; and

WHEREAS, there is in said County of Greene no public general hospital and only a small Red Cross Center which is located at Tannersville, in said County, and there is a constantly increasing need and demand for a public general hospital for the care of the sick in said county; and

WHEREAS, it has been proposed to the Board of Supervisors of said County of Greene and to said Memorial Hospital of Greene County, Inc., by representatives of the New York State Department of Health that a county hospital be established in said county by this board under Section 126 of the General Municipal Law, and such representatives have given this Board assurances of State aid in the establishment and maintenance of such hospital under Article 11-B of the Public Health Law; and

51a

WHEREAS, it has been proposed that the funds which have been received or may be hereafter received by said Memorial Hospital of Greene County, Inc., under the above mentioned wills be devoted to the establishment and maintenance of a public general hospital, as a county hospital, in or near the Village of Catskill, in said County; and

WHEREAS, by special Act of the Legislature of this State (Chapter 132 - laws of 1931), this Board has been authorized and empowered to establish by resolution in said County of Greene a public general hospital; without the approval of such resolution at a general county election; and

WHEREAS, an agreement was duly entered into December 15, 1931, by said Memorial Hospital of Greene County, Inc., and said County of Greene, subject to the approval of the Supreme Court, for the establishment by this Board of a county hospital in said County, and the contribution by said Memorial Hospital of Greene County, Inc., of one-half of the cost of the establishment and erection of such hospital, not exceeding \$50,000.00, and the contribution thereafter by said Memorial Hospital of Greene County, Inc., from year to year of one-half of any deficit in the maintenance and operation of such hospital, not exceeding the income which may be received by said Memorial Hospital of Greene County, Inc., on the remaining funds now held by it or to which it is entitled, such contribution to be made in the manner, to the extent, and subject to the conditions stated in said agreement; and

WHEREAS, pursuant to application duly made by said Memorial Hospital of Greene County, Inc., to the Supreme Court, an order was duly granted by said Court December 19, 1931, authorizing said hospital corporation to so contribute to the establishment and maintenance of said proposed county hospital, subject to the conditions stated in said order;

RESOLVED, that a public general hospital to be located in or near the Village of Catskill, in said county of Greene, be and hereby is established as a county hospital pursuant to Section 126 of the General Municipal Law and said Special Act, being Chapter 132 of the Laws of 1931;

RESOLVED further, that this board proceed with all convenient speed to acquire by purchase a suitable site in or near said Village of Catskill, for the establishment and erection of such county hospital;

52a.

RESOLVED further, that said hospital shall be known as "Memorial Hospital of Greene County;"

RESOLVED further, that there be and hereby is appropriated the sum of \$50,000.00 for one-half of the estimated cost of \$100,000.00, for the establishment of such hospital, including the acquiring of the site therefor, and the erection, construction and equipment of said hospital;

RESOLVED further, that application be immediately made by this Board of New York State Commissioner of Health for the remaining \$50,000.00, of such estimated cost of said hospital, as State aid, under Article 11-B of the Public Health Law;

RESOLVED further, that said agreement of December 15, 1931, between this board and said Memorial Hospital of Greene County, Inc., be and hereby is ratified and confirmed in all respects, and that said county hospital be established, erected, maintained and operated under and pursuant to the terms and conditions of said agreement.

RESOLVED further, that the following named persons be and hereby are appointed members of the Board of Managers of said county hospital, pursuant to Section 127 of the General Municipal Law, for the respective terms set opposite each of their names:

NAME	RESIDENCE	TERM
George W. Irwin	Catskill	5 years
Howard C. Smith	Catskill	4 years
J. Frank Lackey	Tannersville	3 years
Harold B. Moore	Windham	2 years
O. Gates Porter	Athens	1 year

MOTION carried. 12 ayes; no nays, 2 absent, Peloubet & Powell,
County of Greene:

State aid is requested for the following purposes; For the establishment, erection and construction of a public general hospital as a county hospital in and for said County of Greene, under Section 126 of the General Municipal Law, such county hospital having been duly established by the Board of Supervisors of said County of Greene by resolution duly adopted December 29, 1931, a certified copy of which is hereto annexed. This application for State aid is made under Article 11-B of the Public Health Law.

STATE OF NEW YORK, GREENE COUNTY
Clerk of the County Legislature

ss.:

Deputy

I, the undersigned, Clerk of the Greene County Legislature

Do Hereby Certify, that I have compared the annexed copy of the agreement between Memorial Hospital of Greene Co., Inc. and the County of Greene dated December 15, 1931 and the Resolution of the Board of Supervisors of the County of Greene adopting the said agreement

with the original record in this office, and that the same is a correct transcript thereof and of the whole of said original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Greene County Legislature, this 9th day of September, 1974

Joseph K. Clough
Deputy Clerk of the Greene County Legislature.

STATE OF NEW YORK
SUPREME COURT

54a.
EXHIBIT
MONAHAN DECISION

COUNTY OF CLINTON

DANIEL T. MONAHAN, JR.

Plaintiff,

-against-

HERBERT M. BERGAMINI, MARLON
H. ATKINSON and MEMORIAL
HOSPITAL OF GREENE COUNTY,

Defendants.

Main, J.

The defendant, Memorial Hospital of Greene County, has moved for summary judgment dismissing the Complaint in this negligence action, as against it, upon the ground that the hospital is a public general hospital and that there has been no compliance with Section 52 of the County Law and Section 50E of the General Municipal Law.

It is my decision that this defendant is entitled to a summary judgment dismissing the Complaint as against it.

My reasons for considering the hospital to be a public county institution and entitled to the protection of the above-mentioned sections are as follows:

The hospital was formed by the resolution of the Greene County Board of Supervisors, pursuant to Section 126 of the General Municipal Law.

The Board of Supervisors, by the provisions of Section 126, was given the power to levy a tax against the real property within the County, to establish and maintain the hospital.

The Board may appropriate funds received from taxation and from private gifts for the support of the hospital.

All hospital employees are subject to the New York State Civil

Law and are paid by the Treasurer of the County.

All income of the hospital is turned over to the County Treasurer who pays all operating expenses.

The County Board of Supervisors appoints the Board of Managers of the Hospital.

It is true that the resolution of the Board of Supervisors which established the hospital indicated that the Supervisors expected that the assistance to be received from the State of New York, together with funds on hand and to be collected by the hospital committee would prove sufficient to build and maintain the institution. In my opinion, however, this was merely the expression of a hopeful expectation which might or might not be realized. There can be no doubt that the County which receives all hospital revenue and pays all operating expenses would bear the burden of any deficit after the utilization of state aid and voluntary gifts.

This constitutes the signed decision upon which judgment dismissing the Complaint in this action as against the defendant Memorial Hospital of Greene County may be entered.

Dated: July 19, 1962.

Robert P. H. McLean

J. S. C.
Ref. signed

FURTHER MOVING AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK
COUNTY OF GREENE SS:
VILLAGE OF CATSKILL

RAYMOND CLARK, being duly sworn, deposes and
says:

1st. That he is the Administrator of the Memorial Hospital of Greene County and that in said capacity he makes this affidavit in reply to the opposing affidavit of Herman Schmertz, sworn to on September 13, 1974, and in support of the motions of Memorial Hospital of Greene County and Francis Fugaro for an order dismissing the complaint of the plaintiff.

2nd. That pursuant to Chapter 132 of the Laws of New York for 1931, the Legislature of the State of New York authorized and empowered the Board of Supervisors of Greene County to establish in such county a public general hospital. A copy of Chapter 132 of the Laws of New York, 1931, is attached hereto, marked "Exhibit A" and made a part hereof.

3rd. That by resolution of the Board of Supervisors of Greene County, dated February 16, 1931,

Further Moving Affidavit

the defendant hospital was duly created pursuant to Section 45 and 49 of the County Law and Section 126 of the General Municipal Law of the State of New York. That annexed hereto, marked "Exhibit B" and made a part of this affidavit is a certified copy of said resolution.

4th. That by virtue of said resolution the Memorial Hospital of Greene County was and still is an agency or department of the County of Greene and is entitled to all of the immunity and protection afforded the County itself.

5th. That the Board of Managers of the hospital is appointed by the Greene County Board of Supervisors and all hospital employees are subject to the New York State Civil Service Law and are paid by the Treasurer of Greene County.

6th. That all operating income of the hospital is turned over to the Treasurer of Greene County who in turn pays all operating expenses.

7th. That no notice of claim by or on behalf of the plaintiff, THEODORE GRIECO, JR., has been served on the County of Greene and/or Memorial Hospital of Greene County as required by Section 52 of the

Further Moving Affidavit

County Law and Section 50-e of the General Municipal Law of the State of New York.

8th. That your deponent respectfully calls the attention of this Court to an unreported decision of the Supreme Court of the State of New York, held in and for the County of Clinton, entitled "DANIEL T. MONAHAN, JR., plaintiff - against - HERBERT M. BERGAMINI, MARLON H. ATKINSON and MEMORIAL HOSPITAL OF GREENE COUNTY" (Justice Robert G. Main, now assigned to the Appellate Division, Third Judicial Department), which decision is dated July 19, 1962. A copy of Judge Main's decision in that case is marked "Exhibit C", attached hereto and made a part hereof. In that decision, Judge Main held that the hospital was entitled to summary judgment upon the ground that there has been no compliance with Section 52 of the County Law and Section 50-e of the General Municipal Law.

9th. That the membership corporation known as "Memorial Hospital of Greene County, Inc.", does not now, nor did it at any time mentioned in the Complaint in the case at bar, manage, operate, maintain, control or conduct the hospital known as Memorial Hos-

59a.

Further Moving Affidavit

pital of Greene County. Said membership corporation is and always has been a separate and distinct entity from the County of Greene and the Memorial Hospital of Greene County. Since the New York State Legislature authorized the establishment of a public general hospital in Greene County in 1931, and since the Board of Supervisors of Greene County authorized the erection of said hospital, the primary function of the "Memorial Hospital of Greene County, Inc." has been from time to time to solicit funds which it turned over to the hospital.

10th. That your deponent is not and never has been an officer of the Memorial Hospital of Greene County, Inc.

11th. That neither the County of Greene or the Memorial Hospital of Greene County took any part in the filing of the membership corporation papers on May 18, 1926, or the renewal papers which were filed on March 6, 1951.

12th. That your deponent respectfully calls to the attention of the Court the fact that the name of the defendant as set forth in the plaintiff's summons and complaint is "Memorial Hospital of Greene

60a.

Further Moving Affidavit

County", and not "Memorial Hospital of Greene County, Inc".

13th. That Memorial Hospital of Greene County is not a membership corporation and accordingly none of the provisions of the Membership Corporation Law apply to it.

s/ Raymond E. Clark
Raymond Clark

Sworn to before me this

24th day of September, 1974.

s/ Michael E. Catalinotto
Notary Public, State of New York
Michael E. Catalinotto

61a.

SECOND OPPOSING AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

HERMAN SCHMERTZ, being duly sworn, deposes
and says:

He is a member of the firm of Gair, Gair & Conason, attorneys for the plaintiff herein. Deponent makes the instant affidavit, in duplicate original form, both in opposition to the motion of defendant Francis Fugaro to dismiss the complaint as to him (notice of motion dated September 17, 1974) and in further opposition to the separate motion of the co-defendant, Memorial Hospital of Greene County (notice of motion dated August 22, 1974). As a further preliminary, in view of the fact that these are separate motions brought on for basically the same relief and that since the Hospital's motion was first served and first opposed, deponent respectfully incorporates into this affidavit, which is in opposition to both motions, the prior affidavit which he has executed and filed in connection with the motion of the defendant Hospital. For this purpose, deponent attaches to this affidavit, a xerox copy of his

Second Opposing Affidavit

prior affidavit sworn to on the 13th day of September, 1947, together with the two exhibits thereto annexed. In this connection, deponent respectfully requests as well that the Court read his earlier submitted Memorandum of Law in connection with the motion of both defendants.

In plaintiff's initial opposing papers to the original motion for dismissal, deponent exhibited to the Court official papers in the custody of the Secretary of State of New York, showing unequivocally the status of Memorial Hospital of Greene County, Inc. as a membership corporation, originally formed in 1926 as continuing for the initial purposes for which it was formed. And those purposes, as specifically stated in the original corporate certificate, included the formation of that corporation "for the purpose of erecting, establishing and maintaining a hospital or hospitals in the Village of Catskill, Greene County, New York, for the care and treatment of sick and injured persons ***." It was on the basis of such papers that deponent argued in his original affidavit, among other things, that by virtue of these documents, no notice of claim would be required within the meaning of the County Law; your deponent further pointed out that this firm had no know-

Second Opposing Affidavit

ledge whatever of any fact which would have caused the initial moving affiant Clark to allege that the defendant hospital was a department of the County.

Thereafter, deponent's firm was served with papers on behalf of defendant Francis Fugaro. While they contain a mass of purported factual data on the origin and existence of the defendant hospital - in effect simply tossing out without any discussion, various matter and documents in the files of the defendant hospital - these papers do not, it is respectfully submitted, detract one iota from the position originally taken by plaintiff that the defendant hospital may not seek refuge under the umbrella of protection granted exclusively to counties under Section 52 of the County Law.

Wholly to the contrary, a study of those papers reveals that from the very inception of the very concept of Memorial Hospital, its formation, erection, maintenance, operation and control were all vested within the powers of this membership corporation. One need only go to nothing more than paragraph (4) of the specific written agreement between this corporation and the County of Greene dated December 15, 1931 to see that from the inception of the Hospital, the membership corp-

Second Opposing Affidavit

oration was to retain all such control. It is therein provided "(a)s an express and continuing condition" to the obligations assumed by the corporation (designated party of the first part) to contribute "to the erection and maintenance" of the defendant hospital, that "a majority at least of the members of the Board of managers of said county hospital shall be selected, and their successors shall be appointed *** from the members of the board of directors of the party of the first part, to the end that a majority at least of the Board of managers of said county hospital shall at all times be and consist of members of the board of directors of the part of the first part, and the party of the first part may withhold any contribution *** toward the erection or maintenance of said hospital in the event of the failure at any time to comply with such conditions."

Indeed, pursuant to this scheme for the vesting of such control in the board of directors of the corporation, it will also be seen that the very signatory to this agreement on the part of the membership corporation, to wit, George W. Irwin, its president also appears listed as the first named member of the hospital

Second Opposing Affidavit

Board of Managers in the resolution dated December 29, 1931, attached to the moving papers. It is therein stated, furthermore, that Mr. Irwin is to serve for a term of 5 years. That resolution lists four other persons as additional members of the hospital Board of Managers for varying terms of 1 to 4 years. Two of those additional managers, namely Howard C. Smith (4 year term) and J. Frank Lackey (3 year term) also appear along with George W. Irwin as directors of the membership corporation, Memorial Hospital of Greene County, Inc. in its official corporate certificate dated and filed on or about April 9, 1926. That certificate also contains the signatures of a series of incorporators. Those incorporators include 3 members of the Hospital's Board of Managers - J. Frank Lackey, George W. Irwin and Howard C. Smith.

These documents submitted on behalf of moving defendant Fugaro also show vividly and unequivocally that the membership corporation was also formed for the purpose of disbursing and receiving private funds for the establishment, erection, maintenance and operation of a hospital within the County of Greene. Thus, a resolution was adopted on or about December 29, 1931 which

66a.

Second Opposing Affidavit

recited the granting by the Supreme Court, Greene County of an order "authorizing the said hospital-corporation to so contribute to the establishment and maintenance of said proposed county hospital ***." It was per force of that Court order that the membership corporation, in accordance with its written agreement dated December 15, 1931, was legally obligated to "contribute one-half of the cost of procuring a suitable site in or near said Village of Catskill, and the erection thereon and equipment of a public general hospital *** and are also thereafter to contribute from year to year *** to any deficit which may arise in the maintenance and operation of such a hospital to the extent of one-half of such deficit ***."

This provision for mandatory contribution of funds must also be read in connection with the very Act creating the Hospital, dated February 16, 1931 which stated that under this plan for the use of such corporate monies for the maintenance and operation of the institution - as provided in said Act - Greene County itself "would not be called upon to appropriate any funds either for the erection, equipment and maintenance of said County Hospital." (Emphasis supplied.)

Deponent, at this point, should emphasize that

Second Opposing Affidavit

the only facts known to plaintiff's side of the case with respect to documents, materials or facts claimed to relate to the organization, establishment and existence of defendant hospital, are those attached to the defendant Fugaro's motion papers. Deponent has no way of knowing whether there are even further papers to show even greater control on the part of the membership corporation.

So from that perspective, in light of the most unequal knowledge of facts possessed by the respective sides to this litigation, no summary relief in favor of either defendant would be legally fair or just. To the contrary, it seems most strongly to deponent that from the facts thus far revealed by moving defendants, summary relief should only be granted to deny these motions as patently unresponsive to the vivid showing of control in the corporation which teems out of the very exhibits attached to the Fugaro motion papers. As aptly observed in Van Campen v. Olean General Hospital, 210 App. Div. 204, 205 N.Y. Supp. 554, aff'd 239 N.Y. 615:

"There are many public institutions in this state, devoted to the care of afflicted and unfortunate people. They may be conducted directly by the state, or they might be made by statute corporate bodies like school trustees or boards of education. *** Hospitals may be established

Second Opposing Affidavit

by certain municipalities. These are public hospitals. *** Corporations organized by permission of the Legislature undertake to perform similar duties. They are supported mainly through voluntary gifts. These are private corporations. That they are engaged in charitable work for the benefit of the public, and thereby affected with a public interest, does not make them public corporations. *** The fact that they may receive a donation from the government to enable them to carry on their work, or funds from a city or county to care for sick, disabled indigent persons *** does not affect their character as private institutions ***." (Emphasis supplied.)

See also Halberstadt v. Kissane, 31 A.D. 2d 568, 294 N.Y.S. 2d 841; Hamburger v. Cornell University, 204 App. Div. 664, 199 N.Y. Supp. 369, aff'd 240 N.Y. 328.

If the papers annexed to the Fugaro affidavit show anything other than the vesting of exclusive ultimate control of the Hospital in the corporate Board of Directors, that alternative showing would be that the Hospital is actually a partnership or joint venture created by the said membership corporation in conjunction with supervisors of the County of Greene. This new creation or partnership would not be a county or a department of a county, but simply a new entity suable as any

Second Opposing Affidavit

other such partnership or venture might be sued - namely by service of process upon any one of the partners. (See CPLR § 310; Pedersen v. Manitowoc Co., 25 N.Y. 2d 412.)

This, of course, was precisely what was done in this case, namely, service of process upon a membership corporation, one of the partners as well as upon Dr. Fugaro, one of the resident agents or employees. In short, the very least the papers annexed to the Fugaro affidavit reveal is that this is a newly created hospital venture or partnership entity, by no means legally known as any such thing as a Greene County department.

The partnership nature of the hospital entity or its sole proprietorship in the corporation would not be defeated by such allegations as defendant Fugaro makes that his salary is paid by the county. It is a cardinal principle that the source of wage payment is by no means the controlling or determining test to decide the issue of who may be the master or principal. (see generally Warren, N.Y. Negligence, Vol. 2 (C), p. 67).

70a.

Second Opposing Affidavit

Your deponent has read the unreported, unappealed from, decision attached to the Fugaro papers. It is respectfully submitted that this single resolution does not control this Court or plaintiff herein in view of the fact that there is no way of knowing what facts or arguments were presented at that time.

It is a single Special Term opinion, not binding on any Court of co-ordinate jurisdiction in any event, especially without any demonstration of the manner in which the motion of 12 years ago was factually supported or opposed. It is respectfully submitted that this Court dispose of the present motion solely in accordance with the affidavits and documents now before it.

Deponent's firm has lately been served with a further affidavit by Hospital Administrator Clark, dated September 24, 1974. Obviously, it is in response to deponent's earlier opposing papers, yet it abandons by silence the Hospital's initial contention that jurisdiction does not lie for failure to sue in a State Court. Perhaps the Hospital now recognizes the total lack of merit to such earlier submitted argument, which has just been dropped quietly.

71a.

Second Opposing Affidavit

So too, is the merit of the remainder of its stand.

While Clark hopes to persuade that the corporation, of which he was totally silent initially, is merely the solicitor of funds "from time to time", he overlooks, of course, that the corporation, five years before the date of any written resolutions or agreements, was formed for the exact purpose of erecting and maintaining the Hospital. Clark's whole presentation is similarly evasive and/or conclusory in style - never even attempting to reckon with the very terms of the documents upon which he has chosen to rest his contention, in paragraph 9th, that the corporation does not and did not exercise control over hospital business. That the hospital is the corporation or its alter ego - as the public files definitely show - is manifest by its power to staff the hospital management with its board personnel and its power to cut off its finds in the event of a default in this assurance. Its contracted duty, in addition, is to furnish 1/2 of the operating funds - to be matched by 1/2 from the State. To say, that despite this, it is the County which controls the hospital as a department of the County is to defy the documentary foundations

72a.

Second Opposing Affidavit

upon which control actually rests.

Affiant Clark's purported disclaimer of relationship between Memorial Hospital of Greene County, Inc. and the institution of that name - as weak as that protest sounds on its face - is far more specious in context of the fact that this corporation was formed for the specific purpose - and no other - of erecting and maintaining that very hospital. Publication of these data alone in the state-wide office of the Secretary of State was and still is constant, open, reaffirmation and acknowledgement thereof.

WHEREFORE, deponent respectfully requests that both motions be denied.

s/ Herman Schmertz
HERMAN SCHMERTZ

Sworn to before me this
30th day of September, 1974.

s/ ANNE T. ZITO (HOPP)
NOTARY PUBLIC

THIRD OPPOSING AFFIDAVIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

HERMAN SCHMERTZ, being duly sworn, deposes
and says:

He is an attorney at law duly admitted to
practice in this Court and a member of the firm of
Gair, Gair & Conason, attorneys for plaintiff. Deponent
respectfully submits duplicate originals of the instant
Supplemental Affidavit in further opposition to the
separate motions of defendants Memorial Hospital of
Greene County and Francis Fugaro to dismiss plaintiff's
complaint for failure to serve and file a notice of
claim. This present Supplemental Affidavit is made
necessary by a Memorandum Decision of Judge MacMahon
of this Court, in the action of Pope v. Memorial Hospi-
tal of Greene County and John P. Myers; said Decision
having been published in the New York Law Journal of
October 22, 1974, page 22, column 6. For the convenience
of this Court, a copy of that Memorandum is appended
hereto.

It is most respectfully submitted that this

Third Opposing Affidavit

Court should decline to follow the ruling of Judge MacMahon, for the reasons hereinafter stated.

Judge MacMahon, in his Decision, indicated that while "the matter is not free from confusion", nevertheless plaintiff Pope's contention on the issue of control over the hospital by the membership corporation entity should be rejected in view of the fact that such membership corporation may no longer be in existence (footnote 1).

Deponent must take strong issue with the great stress laid by Judge MacMahon on an apparent dissolution of the membership corporation. For one thing, there was not a mention or hint in the instant case by any affiant on behalf of moving defendants that the membership corporation had dissolved. Indeed, the affidavit of affiant Clark herein, sworn to September 24, 1974, indicates that the very contrary is true, and that there never was to this very moment any dissolution of the corporate entity. As Clark states at pages 3-4 of his affidavit, "the primary function of the [corporation] has been from time to time to solicit funds which it turned over to the hospital." Such averments as those are far removed from any claim or contention

Third Opposing Affidavit

on the part of defendants that the corporation was ever dissolved.

Furthermore, while Judge MacMahon cites certain sections of the Not-For-Profit Corporation Law for the Court's proposition that the corporation was dissolved automatically for failure to file a new certificate on or before September 1, 1973, it is most respectfully submitted - and again this relates to a matter never raised or urged by movants - that none of the provisions of that Law provides for automatic dissolution. While the sections involved (principally Sections 113, 1011) especially as recently amended, are terribly unclear as to which entities must refile under the new Statute, Section 1011 clearly and unequivocally provides, however, that no such dissolution of any corporation bound by the provisions of the Not-For-Profit Corporation Law comes about unless the Secretary of State issues and files in his official office a proclamation of dissolution. Section 1011 is very explicit on this - providing in no uncertain terms that dissolution for failure to file renewal certificates is only accomplished "in the following manner" (Subdivision [a]): and the precise manner of dissolution is specified in Sub-

Third Opposing Affidavit

divisions (a) (1), (a) (2) and (a) (3). These Subdivisions state that after September 1, 1973, the Secretary of State, after compiling a list of corporations which have not filed, must make the appropriate proclamation of dissolution, file it in his office and publish the same. It is only upon "the publication of such proclamation as provided herein [that] each corporation named in such proclamation is dissolved * * *." Moving defendants have not submitted a copy of such proclamation, nor hinted that any exists and deponent is perplexed by Judge MacMahon's statement in his Memorandum Decision that the burden of proof on this question should be that of plaintiff - on a motion such as this for summary judgment made by defendant. Indeed, the file of plaintiff's attorneys in this matter shows that as late as June 1974, six months after the malpractice was committed herein, no such proclamation had been issued (see communication by Secretary of State dated 6/19/74, annexed hereto). That communication specifically states that no dissolution has been filed.

In this connection it must also be noted that even had there been a proclamation of dissolution issued, and noone contends that there has been, Section

Third Opposing Affidavit

1012 of the Not-For-Profit Corporation Law provides for simple reinstatement of a corporate certificate by a mere filing as provided. Nothing in Sections 1011 or 1012 may be taken as final or irrevocable dissolution and it is submitted, most respectfully, that the emphasis given by Judge MacMahon on those provisions as compelling matter of law dismissal was undue, since they do not reach and surely are not fairly dispositive of the far broader and deeper issues of fact and law relating to the true and complete picture of hospital control in this case, as well as the question of estoppel (see additionally, CAVALIER v. GEN. ACC. CORP., ___ A.D. 2d ___, 358 N.Y.S. 2d 683), posed in the papers presently before your Honor. These questions, relating to a corporation fully in existence as reaffirmed by a second filing 25 years after its 1926 creation, demand the forum of a full trial, at very best for defendants.

s/ Herman Schmertz

HERMAN SCHMERTZ

Sworn to before me this
23rd day of October, 1974

s/ Candice S. Ram

NOTARY PUBLIC

78a.

EXHIBIT - POPE DECISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
DOROTHY POPE,

Plaintiff,

74 Civ. 3279-LPM

-against-

MEMORANDUM
Decision

MEMORIAL HOSPITAL OF GREENE
COUNTY and JOHN P. MYERS,

Defendants.
-----x

#41320

MacMAHON, District Judge.

Defendant, Memorial Hospital of Greene County.

moves under Rule 12(b), Fed.R.Civ.P., to dismiss the complaint on the ground that no notice of claim was served upon it. Since we have considered matter outside the complaint, we will treat this motion as one for summary judgment, as provided by Rule 56, Fed.R., Civ.P.

1 Although the matter is not free from confusion, ¹ it appears from the affidavits and exhibits submitted on the motion that, beyond any genuine issue of fact, defendant hospital is a department of the County

Exhibit - Pope Decision

of Greene, State of New York, and, therefore, a governmental unit entitled to all of the immunity and protection afforded the county itself.²

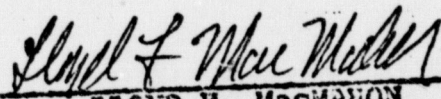
Applying New York law, as we must in this diversity case to recover damages for negligence and malpractice, it is clear that a notice of claim is a condition precedent to suit against Greene County.³ Concededly, plaintiff never served a notice of claim upon defendant hospital.

Accordingly, summary judgment dismissing this action as to defendant hospital is hereby granted, and, there being no just reason for delay, the Clerk of the court is directed to enter judgment dismissing this action as against defendant Memorial Hospital of Greene County.

So ordered.

Dated: New York, N. Y.

October 16, 1974


LLOYD F. MACMAHON
United States District Judge

Pope v. Memorial Hospital
of Greene County

74 Civ. 3279-LFM

FOOTNOTES

1

Plaintiff's contention that defendant hospital is a New York membership corporation is based on confusion of the present day Memorial Hospital of Greene County with an earlier New York membership corporation called "Memorial Hospital of Greene County, Inc."

Exhibit "A" to the moving affidavit consists of a number of resolutions of the board of supervisors of Greene County, one of which is jointly executed with a New York membership corporation called "Memorial Hospital of Greene County, Inc." The resolutions reveal that this membership corporation, organized in 1926 for the purpose of starting a private, non-profit hospital for Greene County, abandoned its plans due to lack of sufficient funds and in 1931 entered into an agreement with the board of supervisors of Greene County to help finance a new county hospital (the present day Memorial Hospital of Greene County), which the board of supervisors had created pursuant to § 126 of the General Municipal Law of the State of New York, after authorization from the State of New York in Chapter 132 of the Laws of New York of 1931.

New York Law 1969, Chapters 1066 and 1067, repealed the Membership Corporations Law and enacted in its place the Not-for-Profit Corporation Law (McKinney's Consol. Laws ch. 35). That law provides, in § 1011, that a corporation which does not file a new certificate, as required by § 113, before September 1, 1973 is dissolved. Since plaintiff has presented no such certificate, it appears, therefore, that the old membership corporation no longer exists.

81a.

Exhibit - Pope Decision

2

See unreported decision in Monahan v. Bergamini (Sup. Ct. Clinton Co., July 19, 1962), annexed to moving affidavit as Exhibit "B."

3

Section 52 of the County Law of the State of New York (McKinney's Consol. Laws ch. 11) and Sections 50-a and 50-1 of the General Municipal Law of the State of New York (McKinney's Consol. Laws ch. 24). Derlicka v. Leo, 281 N.Y. 266, 22 N.E.2d 367 (1939). For the New York decisions applying the "notice of claim" statutes to the county health institutions, see Zillman v. Meadowbrook Hospital Co., 73 Misc.2d 726, 342 N.Y.2d 302 (1973); Stechens v. Department of Health of Orange County, 64 Misc.2d 81, 314 N.Y.S.2d 118 (1970).

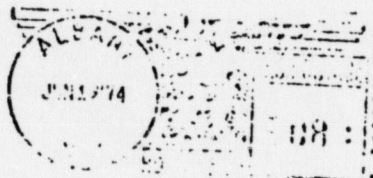
82a.

EXHIBIT - SEC. OF STATE FORM

STATE OF NEW YORK - DEPT. OF STATE
CORPORATIONS BUREAU
162 WASHINGTON AVENUE

MR ALBANY, N. Y. 12225 6/19/74

Memorial Hospital of Greene County,
Inc., a membership corporation,
filed 5/20/26 Catskill, Greene
County. We have no dissolution
filed.



Gair, Gair & Conason
84 William St.
New York, N.Y. 10038
Attn: E.R. Steigman

JOHN P. LOMENZO
Secretary of State

John J. Shupp
Acting Secretary of State

ADDITIONAL MOVING AFFIDAVIT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Same Title]

STATE OF NEW YORK
SS:
COUNTY OF ALBANY

JOHN A. MURRAY, being duly sworn, deposes and
says:

1st. That he is a member of the law firm of MAYNARD, O'CONNOR AND SMITH, attorneys for the defendants, MEMORIAL HOSPITAL OF GREENE COUNTY and FRANCIS FUGARO, and that as said attorney he makes this affidavit in reply to the affidavit of HERMAN SCHMERTZ, sworn to on October 23, 1974, and his letter to the Court dated October 24, 1974.

2nd. The attorney for plaintiff claims that in the case of Pope v. Memorial Hospital of Greene County (reported in the New York Law Journal on October 22, 1974, page 22, column 6), that Judge MacMahon laid "great stress" on an apparent dissolution of the membership corporation known as Memorial Hospital of Greene County, Inc. A reading of Judge MacMahon's opinion belies that assertion. In the opinion itself there is absolutely no reference to the dissolution

Additional Moving Affidavit

of said membership corporation. It is merely referred to in one of the footnotes.

3rd. Judge MacMahon's opinion shows that he placed "great stress" on his conclusion "that, beyond any genuine issue of fact, defendant hospital is a department of the County of Greene". Whether or not the membership corporation known as Memorial Hospital of Greene County, Inc. was or was not dissolved is in no way controlling. The fact is that the hospital is a department of the County of Greene.

4th. It is significant that the plaintiff did not bring suit against the Memorial Hospital of Greene County, Inc. This shows he did not place any great reliance on the membership corporation papers filed in that name.

5th. Any question that the hospital is a department of the County of Greene would be resolved in the event that the plaintiff succeeded in securing a judgment against the hospital. In an attempt to collect any said judgment, the plaintiff would then be asserting that the hospital was a department of the County of Greene. Otherwise there would be no way in which he could collect on his judgment.

85a.

Additional Moving Affidavit

6th. It is respectfully submitted that this Court should follow the determination of Judge MacMahon and grant summary judgment to the defendant hospital and Dr. Fugaro, as provided by Rule 56, Fed. R. Civ. P.

s/ John A. Murray

Sworn to before me this
29th day of October, 1974.

S/ Arthur R. Flores
Notary Public, State of New York

MEMORANDUM OPINION

THEODORE GRIECO, JR., v. MEMORIAL HOSPITAL OF GREENE
COUNTY, FRANCIS FUGARO and PAUL M. SNAPPER
74 Civ. 3325 (MP)

Defendants Fugaro and Memorial Hospital of Greene County separately move to dismiss the complaint against them pursuant to Fed. R. Civ. P. 12(b) and 56 for failure to state a claim entitling plaintiff to relief. The ground asserted is that no notice of claim preceded the suit although required by law as a condition for suit against county departments and their employees. (N. Y. County Law §52, N.Y. General Municipal Law §50-e).

The precise question was raised against this hospital in Pope v. Memorial Hospital of Greene County, 74 Civ. 3279 (LFM) (October 16, 1974), where Judge MacMahon concluded that in such circumstances the suit must be dismissed. For the reasons well expressed therein this Court concludes similarly that this suit must be dismissed as against the hospital. There is no basis for the application of either waiver or estoppel, since a Court does not have general discretion to extend the time for filing and the statutory provisions excusing late filing are not applicable in this case. See, e.g., Pugh v. Board of Education Central District No. 1, 38 App. Div. 2d 619, 326 N.Y.S. 2d 300 (3d Dept. 1971),

Memorandum Opinion

aff'd 30 N.Y. 2d 968, 335 N.Y.S. 2d 830, 287 N.E. 2d 621 (1972). Nor on the facts of this case may the summons and complaint be treated as in fact a timely notice of claim subject to amendment as to form. See, e.g., Montez v. Metropolitan Transportation Authority, 43 App. Div. 2d 224, 350 N.Y.S. 2d 665 (1st Dept. 1974).

Defendant Fugaro is employed by the county hospital as a resident physician and it is alleged that he acted negligently within the course and scope of that employment. The plaintiff's failure to file a notice of claim also bars the suit against Fugaro because as an employee he too is entitled to the conditions imposed by the statute. See Stephens v. Department of Health of Orange County, 62 Misc. 2d 81, 314 N.Y.S.2d 118 (Sup. Ct. Orange Co. 1970); Dorak v. County of Nassau, 329 F. Supp. 497, 502 (E.D.N.Y. 1970), aff'd 445 F. 2d 1023 (2d Cir. 1971).

Plaintiff argues that since the county hospital, Memorial Hospital of Greene County, receives grants from a membership corporation, Memorial Hospital of Greene County, Inc., and since the majority of the county hospital's directors are selected from the

Memorandum Opinion

ranks of the membership corporation by the County Board of Supervisors, this spells control of the County hospital by the membership corporation which plaintiff contends is sufficient to take the county hospital out of the ambit of the claims requirements applicable to county institutions, i.e., in effect it no longer is a viable county institution.

Judge MacMahon in his decision questioned the present existence of the membership corporation due to its apparent failure to qualify as such when the Not-for-Profit Corporation Law was enacted. Plaintiff here presents facts to indicate that such a presumed failure did not ipso facto destroy the status of the membership corporation as an existing entity. But this, if true, does not change the result reached here. Whether plaintiff correctly shows that the membership corporation continues to exist is irrelevant here. The interlocking factors between the county hospital and the membership corporation are insufficient as a matter of law to affect the former's status as a department of Greene County and thus entitled to the protection of the notice of claim requirements before insti-

Memorandum Opinion

tution and as a condition of suits for damages. See Monahan v. Bergamini, (Sup. Ct. Clinton Co., July 19 1962) (unreported decision granting summary judgment dismissing complaint against Memorial Hospital of Greene County for failure to comply with notice of claim requirements).

Snapper has filed an answer to the complaint admitting that he is associated with and on the staff of the Memorial Hospital of Greene County, but denying that he has knowledge or information sufficient to form a belief as to the truth of the allegations that he was an agent or employee of the hospital or acting within the scope of his employment. As an affirmative defense, he asserts that the plaintiff was contributorily negligent in causing the alleged injuries, while he was free from fault or negligence. As a "cross-complaint" against the hospital and Fugaro, the defendant Snapper alleges on information and belief that if plaintiff was damaged by negligence, it was the negligence of the hospital and Fugaro and if Snapper is held liable herein he will be entitled to proportionate indemnity based on proportionate responsibility in

90a.

Memorandum Opinion

negligence from the hospital and Fugaro.

The affidavit of service attached to the Answer and alleged Cross-complaint of Snapper shows that it was served only on plaintiff's attorneys, and consequently no claim is presently pending against the hospital or Fugaro. See Fed. R. Civ. P. 14(a).

There is presently no motion by Snapper addressed to the complaint pending before the Court. If indeed he was in the employ of the county hospital, the requirement of a timely filing of a notice of claim would be a condition precedent to maintaining a suit against him. (See cases cited supra with respect to Fugaro).

Accordingly, the complaint herein is dismissed as against the Memorial Hospital of Greene County and Francis Fugaro, with costs. The Court finds that there is no just reason for delay and judgment in their favor may be entered forthwith. Fed. R.Civ. P. 54(b).

SO ORDERED

s/ MILTON POLLACK
U.S. District Judge

October 30, 1974

91a.

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

Defendants Memorial Hospital of Greene County and Francis Fugaro, having moved the Court to dismiss, under Rules 12(b) and 56, pursuant to the Federal Rules of Civil Procedure, and the said motions having come on to be heard before the Honorable Milton Pollack, United States District Judge, and the Court thereafter on November 4, 1974, having handed down its memorandum decision granting the said motions, and finds that there is no just reason for delay of entry of this judgment, pursuant to Fed. R. Civ. P. 54(b), it is

ORDERED, ADJUDGED and DECREED: That defendants MEMORIAL HOSPITAL OF GREENE COUNTY and FRANCIS FUGARO, have judgment against the plaintiff THEODORE GRIECO, JR., dismissing the complaint as to them only, with costs to be taxed.

Dated: New York, N.Y.
November 12, 1974

s/ Raymond F. Burghardt
Clerk

A P P R O V E D:

s/ MILTON POLLACK
U.S.D.J.

92a.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Same Title]

S I R S :

PLEASE TAKE NOTICE, that plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from a Judgment of this Court dated November 12, 1974, with Memorandum thereon dated October 30, 1974 and handed down November 4, 1974, said Judgment having ordered, adjudged and decreed that defendants Memorial Hospital of Greene County and Francis Fugaro have judgment against the plaintiff Theodore Grieco, Jr., dismissing the complaint as to them only, with costs to be taxed. Plaintiff hereby appeals from each and every part of said Judgment and Memorandum respectively dated as above.

DATED: NEW YORK, NEW YORK,

NOVEMBER 27, 1974.

Yours, etc.,

GAIR, GAIR & CONASON,
Attorneys for Plaintiff
Office & P.O. Address
84 William Street
Borough of Manhattan
City of New York, 10038
(212) 943-1090

93a.

Notice Of Appeal

TO: CLERK OF THE COURT

MAYNARD, O'CONNOR & SMITH, ESQS.
Attorneys for Defendants
Barclay Heights
Route 9W
Saugerties, N.Y., 12477
(914) 246-4620

Affidavit of Service by Mail

In re:

Grieco v. Memorial Hospital of Greene County, Fugaro and Snapper

State of New York

County of New York, ss.:

Harry Minott

being duly sworn, deposes and says, that he is over 18 years of age.

That on JAN 10 1975, 197¹_{copy}, he served ¹ copy of thewithin Appendix in the above named matter

on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Maynard, O'Connor & Smith, Esqs.Attorneys for Defendants-AppelleesBarclay Heights, Route 9WSaugerties, New York 12477

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 10th
day of Jan. 1975

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-267
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1975